No. 94-315

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ANDERS S. BILLING and DIANN E. BILLING,

Petitioners,

vs.

RAVIN, GREENBERG & ZACKIN, P.A.; RAVIN, GREENBERG & MARKS, P.A. and HOWARD GREENBERG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petitioners are seeking review of a question not decided below.

2. Whether the Third Circuit correctly determined that the Petitioners' malpractice claim for alleged post-petition conduct by their bankruptcy counsel was so factually interrelated and closely connected to counsel's fee application as to be part of the claims allowance and disallowance process and to fall within the equitable jurisdiction of the bankruptcy court, resolvable without a jury trial.

LIST OF PARTIES

Petitioners, Anders S. Billing and Diann E. Billing, were the plaintiffs-appellees in the proceedings below.

Respondents, Ravin, Greenberg & Zackin, P.A., Ravin, Greenberg & Marks, P.A. and Howard Greenberg, were the defendants-appellants in the proceedings below.

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ANDERS S. BILLING AND DIANN E. BILLING,

Petitioners,

vs.

RAVIN, GREENBERG & ZACKIN, P.A.; RAVIN, GREENBERG & MARKS, P.A.; AND HOWARD GREENBERG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable Justices of the Supreme Court:

The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit and Order denying Petitioners' Petition for Rehearing are reported at 22 F.3d 1242 (3d Cir. 1994) and are reprinted in the Appendix to the Petitioners' Petition for a Writ of Certiorari at pages A1 and B1, respectively.

The Order and Opinion of the United States District Court for the District of New Jersey are reported at 150 B.R. 563 (D.N.J. 1993) and are reprinted in Petitioners' Appendix at pages C1 and D1, respectively. The Order of the district court denying Respondents' motion for reconsideration is reprinted in Petitioners' Appendix at page E1.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioners filed voluntary petitions under Chapter 11 of the Bankruptcy Code in June, 1989. Respondents — a law firm, its successor law firm and an individual lawyer of the firm — were retained by Petitioners pursuant to an Order of the bankruptcy court to represent Petitioners and related debtors in the bankruptcy proceedings. On August 10, 1992, a Joint Modified Plan of Reorganization was confirmed by the bankruptcy court. (D4).[1] The Plan provided for payment of attorney's fees only in such amounts as may be allowed by the bankruptcy court in accordance with statutory standards. (A4). Respondents filed their final fee application for services rendered in representing Petitioners and related debtors. On October 16, 1992, the debtors filed objections

1. Citations "A__", "B__", "D__" and "E__" refer to Appendix A, B, D, and E, respectively to the Petition for a Writ of Certiorari.

to their former counsel's fee application. Simultaneously with the submission of objections to Respondents' fee application, Petitioners filed a complaint in the United States District Court for the District of New Jersey alleging legal malpractice and requesting trial by jury on those claims. (A4; D4).

A. The Malpractice Claims and Fee Objections

The Petitioners' primary objection to Respondents' fee application before the bankruptcy court rested on their allegations of legal malpractice. (A4).

Petitioners' claims founded on legal malpractice, breach of fiduciary duty, breach of professional obligations and the like all arose in connection with alleged post-petition conduct by Respondents during and as part of the proceedings before the bankruptcy court. Petitioners base their defense to Respondents' fee application and complaint on allegations that Respondents: (1) failed to formulate a confirmable reorganization plan; (2) failed to meet certain bankruptcy court imposed deadlines; (3) acted disloyally toward debtors by counseling them to agree to unreasonable demands of secured creditors; (4) failed to seek a "Wedgewood Order"[2] which supposedly allowed a major secured creditor, Citizens First National Bank, to obtain relief from the automatic stay; (5) failed to oppose a motion by another creditor, First Fidelity Bank, to convert the Chapter 11 proceedings to Chapter 7 proceedings until two days before the return date of the motion; (6) failed to comply with the requirements of the Bankruptcy Code with respect to the assumption of a ground lease for a commercial building; (7) mishandled the sale of Petitioners' residence and the purchase of a new residence; (8) allowed another secured creditor, Amerifirst Bank, to obtain relief from the automatic stay and sell certain real property for less than had

2. *See In re Wedgewood Realty Group, Ltd.*, 878 F.2d 693 (3d Cir. 1989).

previously been offered for the property; and (9) denigrated Petitioners' lender liability claims against Citizens First National Bank. (D4-D5).

The allegations of malpractice and the identical opposition to Respondents' fee application thus related solely to post-petition conduct in the bankruptcy proceeding itself and technical or specialized matters relating to bankruptcy practice and procedure.

B. Respondents' Motion to Dismiss

On November 18, 1992, the Respondents moved in the district court to dismiss the malpractice complaint for lack of jurisdiction or, in the alternative, to refer it to the bankruptcy court and/or stay the district court proceedings until the bankruptcy court resolved the fee application and objections. (A4; D4).

On January 22, 1993, the district court denied the Respondents' motion, holding: (1) the malpractice complaint was a core proceeding within the meaning of the Bankruptcy Code, 28 U.S.C. § 157; (2) the Petitioners' claims were legal and thus gave rise to a right to jury trial; and (3) bankruptcy courts cannot conduct jury trials such that the dispute must be resolved in the district court. (A4-A5; D19-D20).

The Respondents moved for reconsideration based upon the recently decided case of *Travellers Int'l AG v. Robinson*, 982 F.2d 95 (3d Cir. 1992), *cert. denied,* 113 S. Ct. 1946 (1993) (creditors' submission of "contingent" proof of claim to debtors' estate is submission to the equitable jurisdiction of the bankruptcy court and waives jury trial). (E2). The district court denied the motion on February 17, 1993. (E4).

On March 25, 1993, the district court granted the Respondents' motion pursuant to 28 U.S.C. § 1292(b) to certify the

following issues for interlocutory appeal: (1) whether the Petitioners' malpractice action constitutes a core proceeding; (2) whether a bankruptcy court is empowered to conduct a jury trial in a core proceeding; and (3) whether the Petitioners "waived" their right to a trial by jury by submitting to the equitable jurisdiction of the bankruptcy court. (A5). On May 12, 1993, the Third Circuit granted Respondents' petition for leave to appeal. On April 20, 1994, the Third Circuit reversed the district court.

C. The Third Circuit Decision

The Third Circuit did not reach the issue of whether the Petitioners' malpractice action constituted a core proceeding, as it found that the parties did not contest the district court's holding to that effect. (A6-A7). The Third Circuit, however, observed that core proceedings include "matters concerning the administration of the estate" and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship", citing 28 U.S.C. § 157(b)(2)(A,O) (1988). The Third Circuit observed that the district court had ruled that the Petitioners' post-petition claim attacking the competency of bankruptcy counsel was a matter concerning the administration of the estate and that the parties did not disagree with that holding. (A7 n.1).

The Third Circuit did not reach the broad question of whether bankruptcy courts are empowered to conduct jury trials as it was unnecessary under the limited or special facts of this action. The Third Circuit found that the Petitioners have no right to a jury trial under the particular facts of this case.

The Third Circuit determined that the Petitioners had commenced bankruptcy proceedings by filing a voluntary petition and that the Respondents applied for fees under a statutory provision authorizing the bankruptcy court to award reasonable

compensation to bankruptcy counsel after notice and hearing. (A20). The Third Circuit found without question the bankruptcy court had "core jurisdiction" over the fee claim, "whether or not the debtors filed any objection, defenses or affirmative counterclaims". *Id.* Above all, the court ruled that:

> . . . by invoking . . . [Respondents'] alleged malpractice as a defense [to the fee application], the debtors placed the issue squarely before the bankruptcy court for decision. Thus, the question is not whether the bankruptcy court had jurisdiction over the parties and their dispute, but whether the bankruptcy court had the power to decide the proceedings in equity.

The Third Circuit found, under the circumstances of this case, the existence of a close connection and interrelationship between the attorneys' fee application and debtors' malpractice claim:

> In the case at bar, the attorneys' claims for fees arose post-petition, as did the debtors' cause of action for malpractice. Moreover, *the debtors' malpractice suit mirrors its objections to the allowance of attorney's fees.* . . . In the case before us, *the debtors' objections to attorney's fees rested heavily on their claims of malpractice.* The district court recognized the interrelated nature of the actions. . . . *The close connection between the malpractice action and the objections to fees leads us to conclude that the debtors' allegations of malpractice are part of the process of allowance and disallowance of claims.* . . .

> *The fact that the bankruptcy court has explicit jurisdiction to award fees for bankruptcy counsel and other supervisory powers as to bankruptcy counsel strengthens this view. . . .*

[A28-A30 (emphasis added; footnotes omitted)].

Based upon the foregoing, the majority concluded:

> *We hold that an allegation of legal malpractice raised as a defense to post-petition fees for bankruptcy counsel likewise falls within the process of the allowance and disallowance of claims* [just as an attorney's claim for pre-petition fees and the debtor's objections and counterclaims based on negligence and breach of contract clearly arise out of the claims allowance process, citing *In re Frost, Inc.*, 145 B.R. 878, 882 (Bankr. W.D. Mich. 1992)]. The debtors have no Seventh Amendment right to trial by jury, *not because of specific waiver of Seventh Amendment rights, but because their claim has been converted from a legal one into an equitable dispute over a share of the estate. . . .*

[A31-A32 (emphasis added; footnote omitted)].

The Third Circuit further opined that if the Respondents had demanded a jury trial, their request would have been refused on the basis that they had filed a claim for fees with the bankruptcy court. The Third Circuit, therefore, concluded that the Petitioners' request for jury trial should be treated no differently than such a request, if made, by the Respondents, particularly where "the award of attorney's fees to counsel appointed by the bankruptcy

court lies at the heart of the court's equitable jurisdiction and do not implicate the Seventh Amendment right to jury or any Article III issue". The fact that the Petitioners' defense to the attorneys' fee claim may also be a common law malpractice claim does not alter the basic relationship of the debtors and their attorneys to the bankruptcy process. (A33).

The Petitioners sought a rehearing *en banc*, which was denied on May 23, 1994. (B1-B3). Petitioners filed the present Petition for a Writ of Certiorari on August 19, 1994.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS SEEK REVIEW OF AN ISSUE NOT DECIDED BY THE THIRD CIRCUIT.

The Petitioners state the question presented as "[w]hether, by filing a bankruptcy petition, a debtor waives his right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution". (Pi).[3] Petitioners' statement of the question presented, however, is erroneous and misleading as the Third Circuit did not even decide whether a debtor waives his right to a jury trial by filing a bankruptcy petition. To the contrary, the Third Circuit expressly ruled that its finding that the alleged malpractice and fee dispute should be heard by the bankruptcy court without a jury, "not because of specific waiver of Seventh Amendment rights", but because the claim had been converted from a legal to an equitable dispute over a share of the debtors' estate in bankruptcy. (A31-A32).

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3. Citations to "P__" refer to the Petition for a Writ of Certiorari followed by the particular page number.

The Third Circuit, furthermore, specifically stated that its ruling was not founded on the waiver theory which is the purported basis for the Petition for a Writ of Certiorari. (A22-A27). Apparently recognizing the Third Circuit's explicit rejection of the waiver theory, and certainly its rejection of an automatic waiver of a right to jury trial merely as a result of filing a bankruptcy petition, the Petitioners nevertheless claim that "[w]hile the Third Circuit purported to reject the argument that bankruptcy debtors waive their Seventh Amendment rights by filing a bankruptcy petition, that is the practical and inevitable result of the Third Circuit's decision". (P15).

The plain reading of the Third Circuit's ruling directly contradicts the Petitioners' misstatement as automatic waiver of the right to jury trial by filing a bankruptcy petition cannot be the "practical and inevitable result" of the ruling below. To the contrary, the Third Circuit analyzed decisions by other circuits either applying or rejecting the waiver theory under other factual circumstances, such as where a creditor files a proof of claim in a bankruptcy proceeding or where a bankruptcy trustee has the right to trial by jury on claims asserted against third parties not before the bankruptcy court. (A21-A27). *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989) (no waiver of trustee's right to jury trial in fraudulent conveyance action against creditor who had not filed claims against the bankruptcy estate); *In re Jensen,* 946 F.2d 369, 373-74 (5th Cir. 1991) (debtor does not waive jury trial on pre-petition claims submitted to the bankruptcy court by filing a petition for bankruptcy); *In re Hallahan,* 936 F.2d 1496, 1505-06 (7th Cir. 1991) (filing voluntary petition in bankruptcy waives debtor's right to jury trial in dischargeability proceedings brought by a creditor who filed a proof of claim); *Germain v. Connecticut Nat'l Bank,* 988 F.2d 1323, 1330 (2d Cir. 1933) (trustee entitled to jury trial on post-petition claim that debtor's primary lender interfered with debtor's business, as the claim was only incidentally related to the bankruptcy process).

After analyzing these and other cases that addressed the waiver of jury entitlement as a result of filings with or proceedings before the bankruptcy court, the Third Circuit specifically stated that the blanket application of a waiver theory is *not* applicable and is *not* outcome determinative:

> The fact that the debtor may have voluntarily submitted itself to the bankruptcy court's equitable jurisdiction does not complete the analysis. A court must also ask whether the resolution of the particular dispute at issue is necessarily part of the process of the disallowance and allowance of claims. *See Katchen* [*vs. Landy*], 382 U.S. [323] at 336 [1966].

(A26 n. 14).

The Third Circuit similarly held:

> We do not adopt the specific holding of *Jensen* that *any* dispute between a debtor and a creditor who has filed a proof of claim is equitable in nature, for our task is to decide only the case before us.

(A27). The court then distinguished *Germain, supra,* 988 F.2d 1323, which allowed a jury trial on a trustee's post-petition claim for tortious interference unrelated to the allowance of the creditor's claim, whereas here Petitioners' post-petition claims for malpractice mirror and are closely connected to their objections to the allowance of attorney's fees. (A27-A28).

Thus, notwithstanding Petitioners' contrary statement that the "practical and inevitable result" of the ruling below is to declare a

debtors' right to jury trial waived by filing a bankruptcy petition, exactly the opposite is true. The Third Circuit took great pains to reject the automatic or blanket application of a waiver theory to the filing of a bankruptcy petition, in favor of a more fact specific determination of whether the claims for which a jury trial is sought relate to the allowance and disallowance of claims process under the equitable powers of the bankruptcy court. It is respectfully suggested that the Petitioners have misinterpreted or distorted the effect of the Third Circuit's ruling in order to induce this Court to grant a Writ of Certiorari on an issue which was specifically rejected by the Third Circuit and which is, therefore, not germane to this case.

II.

THE DECISION BY THE THIRD CIRCUIT DENYING PETITIONERS A JURY TRIAL ON THEIR MALPRACTICE CLAIMS WAS FACT SPECIFIC AND TURNED ON THE PARTICULAR FACTUAL CIRCUMSTANCES OF THIS MATTER.

As the foregoing discussion reveals, the Third Circuit rejected the waiver theory as the proper analytical framework for determining whether the Petitioners are entitled to a jury trial on their malpractice claims. The Third Circuit's opinion demonstrates that the determination as to whether the malpractice allegations are part of the claims allowance and disallowance process that invokes the equitable powers of the bankruptcy court and converts an otherwise legal claim into an equitable one, to which no right to jury trial attaches, requires in each instance a fact specific and fact sensitive analysis. [*See* A8, stating ". . . the debtors have no right to a jury trial *in this instance*" (emphasis added)]. The determination must be made on a case by case basis. It depends upon the "close connection" between the malpractice action and the debtors' objections to fees. (A29). Accordingly, no broad principle of law or

issue of overriding federal policy is implicated by the Third Circuit's ruling that the Petitioners are not entitled to a jury trial in this instance.

That determination was based upon the particular circumstances of this case in which the debtors simultaneously filed malpractice claims and objections to the Respondents' fee application before the bankruptcy court, which were interrelated and mirrored each other, became part of the claims allowance and disallowance process, and invoked the exclusive equitable jurisdiction of the bankruptcy court to appoint and supervise bankruptcy counsel and award compensation to bankruptcy counsel. [A28-A30 & n.18; 11 U.S.C. §§ 327(a), 328(c), 330(a)(1), (2) (1988)].

Since the decision by the Third Circuit was narrow and limited to the facts of this case, there is no reason for this Court to review the matter. Petitioners' request for a Writ of Certiorari should be denied.

III.

THE THIRD CIRCUIT'S RULING IS CONSISTENT WITH PRIOR DECISIONS BY THE SUPREME COURT AND THE CIRCUITS.

The Petitioners argue that the Third Circuit's ruling is inconsistent with the decisions of the Supreme Court, notably *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989), and in conflict with the rule of the Second Circuit enunciated in *Germain v. Connecticut Nat'l Bank,* 988 F.2d 1323 (2d Cir. 1993). (P7-P17). As set forth hereafter, the Petitioners are wrong. The majority opinion by the Third Circuit clearly demonstrates that prior decisions by this Court and the Second Circuit are consistent with and support the holding that Petitioners are not entitled to a jury trial under the specific circumstances of this matter.

A. *GRANFINANCIERA, KATCHEN* And *LANGENKAMP,* When Read Together, Clearly Support The Third Circuit's Holding That Petitioners' Claims Fall Within The Allowance And Disallowance Of Claims Process.

The Seventh Amendment preserves the right to trial by jury "[i]n Suits at common law" involving amounts greater than $20. U.S. Const. amend. VII. "Suits at common law" means cases involving legal rights, as opposed to equitable claims to which no jury right attaches. *Granfinanciera,* 492 U.S. at 41. *Granfinanciera* established a three-pronged test for determining whether a claim is equitable or legal. Under *Granfinanciera,* a right to jury trial exists if: (1) the nature of the action would have been "at law" under the eighteenth century practice in effect when the Seventh Amendment was enacted; (2) the remedy sought is legal in nature; and (3) "private" rights as opposed to "public" rights are in issue. 492 U.S. at 42. The *Granfinanciera* Court emphasized that the Seventh Amendment does not provide an absolute right to a jury trial on all legal claims. *Id.* at 42 n.4. The Respondents do not dispute that a claim for legal malpractice ordinarily sounds in law, not equity. (A9).[4]

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4. Petitioners assert that a debtor in bankruptcy is entitled to a jury trial with respect to his malpractice claims against his bankruptcy counsel, citing *In re SPI Communications & Marketing, Inc.,* 112 B.R. 507, 512 (Bankr. N.Y. 1990). (P9 n.1). However, the Petitioners fail to mention that *SPI Communications* involved a *pre-petition* claim for malpractice which was independent from and unrelated to any fee application by counsel or any defense by the debtors asserted in response to a fee application, unlike the present matter. Moreover, as the Third Circuit stated, the bankruptcy court in *SPI Communications* never even discussed ". . . the third prong of *Granfinanciera* or the possible limitations of *Granfinanciera* implicit in other Supreme Court precedent . . ." in concluding that the attorney had a right to a jury trial on the malpractice claims against him. (A9). *SPI Communications,* therefore, provides no guidance in resolving the present issue concerning the right to a jury trial on a claim for legal malpractice which is integrally related to the claims allowance and disallowance process and hence an equitable claim to which no jury trial attaches by reason of the debtors' assertion of malpractice in defense to bankruptcy counsel's fee application in the bankruptcy proceeding.

The Third Circuit correctly ruled that while the Petitioners may have satisfied the first two prongs of the *Granfinanciera* test, the third prong reveals or creates exceptions to the right to a jury trial on a claim legal in nature. (A9). *Granfinanciera* recognizes that Congress may assign disputes involving "public rights" to a tribunal that does not use a jury without violating the Seventh Amendment, including non-Article III tribunals such as bankruptcy courts. A9; *Granfinanciera,* 492 U.S. at 42, 51.

The Third Circuit correctly observed that:

> The category of public rights may include seemingly private rights, if they are closely integrated into a public regulatory scheme assigned to an administrative agency.

A10; *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 593-94 (1985); *Beard v. Braunstein,* 914 F.2d 434, 441 (3d Cir. 1990).

The third prong of the *Granfinanciera* test and other Supreme Court decisions have limited the Seventh Amendment right to jury trial in bankruptcy related matters for reasons in addition to the public rights doctrine. The *Granfinanciera* Court discussed, without overruling, *Katchen v. Landy,* 382 U.S. 323 (1966), involving a creditor's right to jury trial in bankruptcy proceedings. *Granfinanciera,* 492 U.S. at 57.

In *Katchen,* a creditor had filed a proof of claim and the trustee counterclaimed to recover alleged preferential payments from the debtor prior to the date of bankruptcy. After having filed his proof of claim, the creditor invoked his Seventh Amendment right to a jury trial on the preference claim against him. In concluding that the creditor was not entitled to a jury trial on preference issues, the *Katchen* Court concluded:

> . . . although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 [(1932)], when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity.

Katchen, 382 U.S. at 336. Thus, this Court has held that a right to trial by jury does not exist where the claims allowance process is implicated since what would otherwise be a creditor's legal claim has been converted into an equitable claim to a pro rata share of the *res*. *Id.*

In *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 53 S. Ct. 50, 77 L. Ed. 185 (1932), the bankruptcy trustee sued in equity to recover allegedly preferential transfers. The Supreme Court determined that the suit should have been heard at law because the defendants had never counterclaimed or asserted a claim against the bankruptcy estate. 287 U.S. at 96-7. Because the trustee's claims were asserted outside the bankruptcy court, they

> . . . more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res [such that the defendants were entitled to jury trial in the trustee's action to recover a fraudulent conveyance].

Granfinanciera, 492 U.S. at 56.

The *Granfinanciera* Court found no conflict between its

holding that a defendant, sued by a bankruptcy trustee to recover allegedly fraudulent transfers, is entitled to trial by jury when the defendants have not submitted any claim against the bankruptcy estate, and its prior holding in *Katchen* that a person who has asserted a claim against the bankruptcy estate is not entitled to a jury trial in the trustee's preference action. *Granfinanciera,* 492 U.S. at 57. The *Granfinanciera* Court took pains to point out that its rulings in no way undermined, and were consistent with, its earlier decisions in *Katchen* and *Schoenthal. Id.* at 58.

The *Granfinanciera* Court, as the Third Circuit correctly observed, interpreted *Katchen* and *Schoenthal* "as holding that, under the Seventh Amendment, a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate". 492 U.S. at 58. The *Granfinanciera* Court specifically embraced the rule of *Katchen* concerning the absence of a right to jury trial on matters relating to the claims allowance and disallowance process, stating:

> As *Katchen* makes clear, however, by submitting a claim against the bankruptcy estate, creditors subject themselves to the Court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate.

492 U.S. at 59 n.14.

The Third Circuit, therefore, correctly applied existing precedent established by the Supreme Court in denying Petitioners trial by jury on malpractice claims which were identical to their objections to the Respondents' fee application, and hence were

integrally related to the process of allowance and disallowance of claims.[5]

Even if the *Granfinanciera* Court did not whole-heartedly embrace *Katchen,* subsequently it did so in *Langenkamp v. Culp,* 498 U.S. 42 (1990) (per curiam). *Langenkamp* expressly holds that creditors who file proofs of claim against a bankruptcy estate are not entitled to jury trials on matters affecting the allowance of those claims. 498 U.S. at 45. The *Langenkamp* Court interpreted *Granfinanciera* as recognizing that a creditor loses the right to a jury trial upon filing a proof of claim which triggers the process of allowance and disallowance of claims and thus invokes the equitable jurisdiction of the bankruptcy court. *Id.* at 44.

As the above analysis demonstrates, the Third Circuit's holding in this case is consistent with the decisions by this Court in *Katchen, Granfinanciera* and *Langenkamp.* In the latter two opinions, this Court has expressly embraced its earlier ruling in *Katchen* that there is no right to trial by jury where the claims allowance process is implicated because the Bankruptcy Act converts a legal claim into an equitable one. (*Supra.*) Since the present malpractice claim and defense to Respondents' bankruptcy fee application are identical, closely connected and intertwined, the Third Circuit correctly applied existing precedent to deny Petitioners a jury trial under the facts of this case. This Court should, therefore, deny the Petition for a Writ of Certiorari.

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5. The Supreme Court, in fact, determined that *Katchen* "supports the result we reach [in *Granfinanciera*]; it certainly does not compel its opposite." 492 U.S. at 59. As the Third Circuit observed below, "[w]hile this statement may not be a whole-hearted embrace of the *Katchen* approach, it is clearly not an overruling." (A17).

B. Alternatively, Petitioners' Post-Petition Malpractice Claim Against Bankruptcy Counsel Is A Public Right To Which No Jury Trial Attaches.

The dissenting opinion by Judge Sloviter below attempts to reconcile *Granfinanciera, Katchen* and *Langenkamp* by describing the latter two as public rights cases. (A38). As the majority observed, even if this were true and actions to recover preferences from pre-petition creditors involved public rights, then certainly actions to recover for post-petition malpractice by the debtor's bankruptcy attorney, an appointed officer of the court, must also involve public rights. (A17-A18, n.8). Not only do both types of action involve administration of the bankruptcy estate, but the malpractice allegations are "more integrally related to bankruptcy administration than the simple recovery of a preference" (A17-A18, n.8), particularly where those allegations are raised in defense to bankruptcy counsel's fee application over which the bankruptcy court has explicit jurisdiction. A20; 11 U.S.C. § 330(a) (1988); 28 U.S.C. § 157(b)(1), (2) (bankruptcy court has core jurisdiction over matters of estate administration).

C. *Germain* Not Only Is Consistent With The Third Circuit's Ruling, But Strongly Supports It.

Although the Petitioners assert that the Third Circuit's opinion is inconsistent with the 1933 opinion by the Second Circuit in *Germain, supra*, 988 F.2d 1323, precisely the opposite is true. *Germain* is not only consistent with the ruling below, but strongly supports it.

In *Germain*, the debtor's primary lender filed a proof of claim and the trustee sued it six months later for interfering with the debtor's business during the post-petition period. 988 F.2d at 1325-26. The Second Circuit determined that the tortious interference claim was legal in nature such that the trustee's request for a jury

trial had to be honored. *Id.* at 1328-29. The court held that the trustee did not lose the right to jury trial in a case that only incidentally related to the bankruptcy process. *Id.* at 1330. The debtor's post-petition tortious interference claim against his lender was unrelated to the lender's proof of claim relating to a pre-petition debt. *Id.* at 1328.

In contrast, in the present action Petitioners' legal malpractice claim relates to alleged post-petition conduct by debtors' bankruptcy counsel in connection with legal representation during the bankruptcy proceeding, counsel was appointed by the bankruptcy court in connection with the administration of the bankruptcy estate, and the malpractice allegations were voluntarily asserted by the debtors in defense to counsel's fee application over which the bankruptcy court had jurisdiction. 11 U.S.C. § 339(a)(1), (2). The Petitioners' malpractice claims, therefore, were part of the process of allowance and disallowance of claims, particularly given the close connection between the interrelated malpractice action and objections to an award of attorney's fees.

Moreover, the Second Circuit in *Germain* specifically addressed the present situation involving a malpractice claim asserted against bankruptcy counsel, stating:

> *[t]o the extent that ... the debtor was essentially objecting to the allowance of the attorney's claim and that the debtors success meant the disallowance of the attorney's claim, we agree that the debtor's objection was part of the claims-allowance process.*

988 F.2d at 1330 n. 9 (emphasis added). Given the interrelated nature of the malpractice claims and fee objections, contrary to the Petitioners' erroneous assertion, *Germain* supports the Third Circuit's ruling,

particularly since "the debtors' malpractice suit mirrors its objections to the allowance of attorney's fees". (A28).

D. It Is Premature For This Court To Review The Issues Presented.

Other decisions by the circuits concerning Seventh Amendment rights in the context of bankruptcy proceedings do not reflect confusion over this Court's decisions in *Granfinanciera* and *Langenkamp* despite Petitioners' contrary assertions. (P18-P20). Those other decisions are factually distinguishable, just as *Germain* is factually distinguishable from the present matter. (Point III C, *supra*).

See In re Hallahan, supra, 936 F.2d at 1505-06 (debtor who files voluntary bankruptcy petition has no right to jury trial in dischargeability proceedings brought by a creditor who filed a proof of claim because, under *Granfinanciera*, a dischargeability proceeding is equitable in nature and filing a bankruptcy petition also waives jury right on legal claims); *In re Jensen, supra*, 946 F.2d at 373-74 (rejecting the waiver theory and holding that an unrelated state-law suit by debtor in possession against non-creditor third parties is not part of the process of allowance and disallowance of claims so that debtor retains his right to a jury); *In re McClaren*, 3 F.3d 958 (6th Cir. 1993) (debtor waives right to jury trial in a non-dischargeability proceeding by filing bankruptcy petition, although the Court did not mention that a non-dischargeability action is an equitable proceeding).

In contrast, the ruling below by the Third Circuit was not based on a waiver theory as some of the preceding cases were. The present action also involves post-petition claims of malpractice (unlike the above cases) identical to the debtor's objections to an attorney's fee award (also unlike the above cases). In light of the factual distinctness of the circumstances before the Third Circuit,

the different fact patterns addressed by other circuits and the paucity of cases in the circuits concerning the circumstances under which a debtor loses the right to jury trial in the bankruptcy context, this Court should allow the issue to continue percolating among the circuits. Review of the issue at this time would be premature.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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